

IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00013 COA

RAYMOND LEE CLARK

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

THOMAS D. BERRY

HARRY P. SNEED, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL (FELONY)- MURDER

TRIAL COURT DISPOSITION: RAYMOND LEE CLARK FOUND GUILTY OF THE CRIME OF MURDER AND SENTENCED TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., DIAZ, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

Raymond Lee Clark asks this Court to set aside his conviction of murder rendered by a jury in the Harrison County Circuit Court. He asserts two grounds to attack the jury verdict, one of which we find to be of sufficient merit to require reversal and remand for a new trial. Because of the possibility of a retrial, we will also address the additional issue raised.

I.

Facts

Clark was accused in the shooting death of Troy Nibbs. The evidence showed that Nibbs had been shot while occupying a vehicle outside his grandmother's home. There were no eyewitnesses, but Clark came under suspicion based upon evidence that he and Nibbs had been involved in a feud. During the course of the police investigation, Clark's brother, Larry Clark, gave a statement establishing Clark's presence at the time of the shooting. He reported witnessing an argument between Clark and Nibbs, hearing four or five gunshots, and the fact that he and the defendant subsequently fled the scene of Nibbs' death. Raymond Lee Clark was subsequently indicted for the murder, and Larry Clark was indicted as an accessory after the fact.

The State, in its case in chief, called Larry Clark as a witness, apparently in expectation that he would provide essentially the same information that he had given in his earlier statement to the investigating authorities. He did not. Instead, he attempted to invoke his Fifth Amendment right not to testify. The trial judge compelled him to answer, and he proceeded to deny any knowledge of the facts surrounding the shooting.

The State later called Detective Carvin, who had taken the statement from Larry Clark, and he was permitted by the trial court, over the defendant's objection, to testify as to the version of events Larry Clark related to him during the investigation. Defense counsel then moved that the court instruct the jury that the information in the statement could not be considered as substantive evidence, but was admissible for the sole purpose of impeaching the witness, Larry Clark. The trial court refused to instruct the jury. Again, at the conclusion of all the evidence, defense counsel stated, "What I wanted

the court to do was to instruct the jury that the testimony of Whitney Carvin could not be considered by them as material testified [sic] but only as impeachment of the witness Larry Clark." The trial court stated, "I will not instruct the jury because I think that that would be the Court commenting upon the evidence and that would be improper for sure."

II.

Discussion

Prior out-of-court statements by non party witnesses are generally not admissible as substantive evidence if "offered in evidence to prove the truth of the matter asserted" when a timely hearsay objection is entered. M.R.E. 801(c); M.R.E. 802. However, such statements may be admitted as "prior inconsistent statements" for the limited purpose of impeaching the credibility of the witness. M.R.E. 613; *Brown v. State*, 556 So. 2d 338, 340-41 (Miss. 1990) (citations omitted). Rule 105 of the Mississippi Rules of Evidence, however, clearly states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request shall restrict the evidence to its proper scope and *instruct the jury accordingly*.

M.R.E. 105 (emphasis supplied).

The trial court was not in error in admitting Larry Clark's prior statement given to the police. In *Bush v. State*, the supreme court approved the use of a prior statement given to an investigative officer to impeach a witness. *Bush v. State*, 667 So. 2d 26, 28 (Miss. 1996). Nevertheless, it is quite clear that the prior statement was admissible for the limited purpose of impeaching Larry Clark's testimony only and could not be considered as affirmative evidence of the events immediately surrounding the death of Troy Nibbs. It was incumbent upon the trial court, upon timely request of the defendant, to properly instruct the jury as to the limited purposes for which it could consider the out-of-court statement. Twice given the opportunity, the court twice erred by refusing to give the instruction clearly mandated by Rule 105.

Therefore, the sole consideration left to this Court is whether, taking the record in this case as a whole, we can conclude that the error was harmless. The supreme court, in *Harrison v. State*, held that where there was "ample evidence" to support the conviction, the failure to give a limiting instruction may be considered harmless. *Harrison v. State*, 534 So. 2d 175, 179 (Miss. 1988). However, in *Ferrill v. State*, the supreme court reversed a conviction for the failure to give such a limiting instruction in a case where the court concluded that there was "little concrete evidence" to support the conviction. *Ferrill v. State*, 643 So. 2d 501, 505 (Miss. 1994).

Absent Larry Clark's testimony placing his brother at the scene, there is little direct evidence of the defendant's guilt. There was evidence that he made exculpatory admissions to two people; however,

in both instances he also affirmed his lack of involvement in the homicide. One of the persons who claimed to have heard the defendant admit the killing, testified that the defendant gave a number of details of the nature of the victim's injuries that were apparently corroborated by the testimony of Dr. McGarry. Nevertheless, it is quite clear from the record that the State relied heavily on the "evidence" provided by Larry Clark's extra-judicial statement to obtain a conviction. In closing argument, the prosecuting attorney improperly urged the jury to reach conclusions as to the facts that could only be supported by Detective Carvin's recitation of Larry Clark's prior statement made during the investigation. In part, the State argued to the jury as follows:

Did Larry Clark tell you anything when he took the witness stand. Did Larry Clark tell you the truth when he took the witness stand? He didn't tell you anything. Availed himself with his Fifth Amendment right to remain silent. . . . He's the defendant's brother and he's helping his brother. . . .

Did Whitney Carvin lie to you? Did he lie to Whitney Carvin the day after the incident? No. He told Detective Carvin exactly what happened. Troy Nibbs and his brother were arguing. He walked up perhaps to try to calm the situation down, is what he told Detective Carvin. And when he got there, he saw Troy Nibbs bending in his vehicle; and he backed in turn; and he heard four to five shots; and he and Raymond Clark ran. That's what he told him within twenty-four hours of the murder.

In *Brown v. State*, the supreme court considered a similar situation where the State had argued for the consideration of evidence introduced for impeachment purposes in support of a conviction. *Brown v. State*, 556 So. 2d 338, 340-41 (Miss. 1990). The court reversed the conviction, observing that the jury, under these circumstances, "had a difficult chore distinguishing between the substantive and the impeachment evidence." *Id.* at 341.

This Court cannot conclude that the erroneous refusal of the trial court to instruct the jury as to the limited purpose for which it could consider Detective Carvin's testimony concerning Larry Clark's prior statement, compounded as it was, by the improper argument of the evidence by the State in final summation, was harmless. Though not every error in the conduct of a criminal trial warrants reversal, we conclude that the procedural problems associated with this conviction are of sufficient gravity that justice compels us to reverse and remand the case for a new trial before a jury that (a) is fully informed of the limited purposes for which such out-of-court statements may be considered, and (b) is not subjected to argument by the State urging the jury to consider the evidence for the very purpose for which it may not be admitted.

As a final note, we find it pertinent to address Clark's assertion that the trial court erred in refusing to allow a written statement contrary to testimony given at trial for the purpose of impeaching witness James Hill. The trial court concluded that the prior statement, given at the urging of the defendant's attorney, was not worthy of consideration by the jury. The circumstances surrounding a prior statement, short of coercion, fraud, or some other showing that would effectively make a statement not the declarant's, go to probative value and not to admissibility. On remand, if the evidence is presented in such a way that the issue becomes relevant, the defense should be allowed to introduce that prior statement into evidence for the limited purpose of impeachment. *See* M.R.E. 613.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY FINDING RAYMOND LEE CLARK GUILTY OF THE CRIME OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS REVERSED AND THIS CAUSE REMANDED TO THE HARRISON COUNTY CIRCUIT COURT. COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.